

### **Factual Allegations**

14. On June 25, 2004, the Public Staff of the North Carolina Utilities Commission ("Public Staff") filed a Motion for Order Concerning Eligibility for One-Day Notice and ILECs' Obligations to Offer Promotions to Resellers. *See* Exhibit 3, attached hereto. Among the issues for which the Public Staff sought guidance was the following: "If a [local exchange carrier] offers a benefit in the form of a check, a coupon for a check, or anything else of value for more than ninety days to incent subscription or continued subscription to a regulated service, is it required that the benefit be offered to resellers in addition to the reseller discount?"

15. On July 7, 2004, the Commission issued an order seeking comments on the Public Staff's Motion. On August 6, 2004, the Public Staff filed comments advocating, in pertinent part, that ILECs such as BellSouth be required to offer non-regulated marketing incentives such as gift cards to resellers in addition to the wholesale discount on regulated telecommunications services. *See* Exhibit 4, attached hereto.

16. Also on August 6, 2004, BellSouth, ALLTEL Carolina, Inc., Carolina Telephone and Telegraph Company and Central Telephone Company (collectively, "Sprint"), and Verizon South, Inc. ("Verizon") filed comments with the Commission advocating, in pertinent part, that ILECs are required to sell to CLPs at wholesale rates any "telecommunications service" that the ILEC offers to retail customers so that the CLP can resell the service to end users. Furthermore, marketing incentives are not telecommunications services and do not reduce the retail rates customers pay for telecommunications services, and thus as a matter of law are not subject to the resale requirements of the Act. *See* Exhibits 5 and 6, attached hereto.

17. On August 31, 2004, the Public Staff filed its Reply Comments, which argued that even if marketing incentives are not telecommunications services and are not subject to resale, they “effectively” constitute a discount on such services, and “[i]t is irrelevant whether the cost of the telecommunications service is directly affected or the customer reduces his expenses elsewhere.” See Exhibit 7, attached hereto.

18. On August 31, 2004, BellSouth, Sprint and Verizon filed their respective reply comments, which emphasized that the Public Staff’s position regarding ILECs’ resale obligations with regard to marketing incentives was wholly unsupported by law, basic principles of statutory interpretation, and common sense. See Exhibit 8, 9, and 10, attached hereto.

19. On December 22, 2004, the Commission issued its Order Ruling on Motion Regarding Promotions (Exhibit 1, attached hereto) (the “First Resale Order”). The Commission erroneously ruled that marketing incentives such as gift cards “are in fact promotional offers subject to the FCC’s rules on promotions.” First Resale Order, p. 11.

20. The Commission expressly acknowledged that marketing incentives “are not discount service offerings *per se* because they do not result in a reduction of the tariffed retail price charged for the regulated service at the heart of the offerings.” First Resale Order, p. 11. However, it then erred in finding that a marketing incentive “reduces the subscriber’s cost for the service by the value received in the form of a gift card or other giveaway. The tariffed retail rate would, in essence, no longer exist, as the tariffed price minus the value of the gift card received for subscribing to the regulated service, i.e., the promotional rate, would become the ‘real’ retail rate.” First Resale Order, p. 11.

21. The Commission's inquiry should have ended once it found that marketing incentives are not discount service offerings because they do not result in a reduction of the tariffed retail price charged for the regulated telecommunications service offerings. Instead, it decided to modify, if not rewrite, section 251(c)(4)(A) of the Act by expanding the scope of an ILEC's resale obligation to include unregulated marketing incentives.

22. In so finding, the Commission ignored the facts that (1) marketing incentives such as gift cards cannot be used to pay for (i.e., reduce the retail rate of) telecommunications services; (2) consumers may choose not to use a gift card or other marketing incentive, or to give it away, and thus might not derive any actual value from it; (3) CLPs use marketing incentives as well, so they are fundamentally different from and unrelated to price discounts offered on retail telecommunications services by ILECs; and (4) the Act mandates that wholesale rates be calculated "on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing . . . and other costs that will be avoided by the local exchange carrier." 47 U.S.C. § 252(d)(3). The Act does not authorize state commissions to set wholesale rates based on hypothetical "real retail rates."

23. As a result of its unwarranted expansion of the scope of the Act and its erroneous findings, the Commission held that "in order for a gift card type promotion not to require an adjustment to the resale wholesale rate (caused by the fact that the retail price has in effect been lowered), such a promotion must be limited to 90 days, unless the ILEC proves to the Commission that not applying the resellers' wholesale discount to the promotional offering is a reasonable and nondiscriminatory restriction on the ILEC's resale obligation." First Resale Order, pp. 11-12.

24. On February 18, 2005, BellSouth filed a Motion for Reconsideration or, in the Alternative, For Clarification, and for a Stay of the Commission's December 22, 2004 Order. See Exhibit 11, attached hereto. In this Motion, BellSouth argued that the Commission's First Resale Order created a novel resale obligation that is contrary to the resale requirements of the Act and is unprecedented in the nine states in which BellSouth operates. BellSouth also argued that this unprecedented interpretation of the Act would require BellSouth to incur significant expenses creating North Carolina-specific exceptions in its marketing operations, which could compel BellSouth to offer North Carolina consumers fewer and/or less attractive marketing incentives than it offers to consumers in other states.

25. BellSouth noted in its Motion for Reconsideration that pursuant to the Act and the FCC's rules, the Commission already had deducted costs attributable to marketing expenses in calculating the wholesale discount CLPs receive when they purchase BellSouth's retail telecommunications services for resale. Thus, requiring ILECs to resell marketing incentives (or the value thereof) at a wholesale discount forces the ILECs to subsidize the CLPs marketing efforts and allows the CLPs to avoid the very costs that the resale provisions of the Act require each carrier to bear. The manifest unfairness of such a result is demonstrated by the fact that many marketing incentives offered by BellSouth are *in response to* marketing incentives initiated by a CLP. This pro-consumer competition in the retail marketplace will be thwarted if one side (the ILECs) is forced to subsidize the other (the CLPs).

26. On June 3, 2005, the Commission issued its Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay ("Second Resale Order") (Exhibit 2, attached hereto). Though the Commission acknowledged that section 252(d)(3) of

the Act provides that the wholesale rates to be charged to resellers are to be determined on the basis of rates charged to subscribers, it ignored this unambiguous statutory language and effectively rewrote section 252(d)(3) of the Act by holding that marketing incentives have the effect of lowering "the actual, 'real' retail rate." Second Resale Order, p. 5.

27. The Commission further erred by requiring that BellSouth determine "the price lowering impact of any such 90-day-plus promotions on the real tariff or retail list price" and pass the benefit of such a reduction on to resellers through a wholesale discount on the "lower actual retail price." Second Resale Order, p. 6. The Commission provided no guidance on how this hypothetical "real retail price" should be calculated, instead stating that it "intentionally left this matter open so that the parties would be free to negotiate." *Id.* If a negotiated solution is not possible, the ILECs and CLPs may bring the matter before the Commission, but if it is too difficult to calculate the "real retail price," the Commission will presume that a marketing incentive "would be unreasonable and discriminatory." Second Retail Order, pp. 6-7.

28. On June 27, 2005, BellSouth filed a Motion for Extension of Time to Appeal the Second Resale Order. *See* Exhibit 12, attached hereto. On June 28, 2005, the Commission granted this Motion and extended the time for BellSouth to appeal the Second Resale Order to August 2, 2005. *See* Exhibit 13, attached hereto.

### **FIRST CLAIM FOR RELIEF**

#### **Declaratory Judgment Regarding Violation of the Telecommunications Act of 1996**

29. BellSouth restates and realleges the allegations in paragraphs 1-28 of this Complaint as if fully set forth herein.

30. The North Carolina Utility Commission's conclusions in the First and Second Resale Orders that BellSouth is required to offer CLPs a wholesale discount on marketing incentives (or the value thereof) in addition to the wholesale discount offered on its retail telecommunications services is contrary to and violates the Telecommunications Act of 1996.

31. By its plain meaning, section 251(c)(4) of the Act mandates the resale of telecommunications services made available to retail subscribers. It does not mention or concern, directly or indirectly, the resale of independent marketing incentives or providing the value of such incentives to CLPs at a discounted wholesale rate.

32. Section 252(d)(3) of the Act provides that the wholesale rates to be charged to resellers are to be determined "on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing . . . and other costs that will be avoided by the local exchange carrier." Nowhere does the Act mention or sanction the concept of a "real" or "actual" retail rate based on the value of marketing incentives to consumers.

33. By misinterpreting and attempting to substantially rewrite and expand the scope of the Act, the Commission has acted in violation of federal law.

34. For these reasons, BellSouth is entitled to a declaration under 28 U.S.C. § 2201 that the portions of the First and Second Resale Orders concerning BellSouth's resale obligations regarding one-time marketing incentives such as gift cards are unlawful.

## **SECOND CLAIM FOR RELIEF**

### **Injunctive Relief**

35. BellSouth restates and realleges the allegations in paragraphs 1-34 of this Complaint as though fully set forth herein.

36. Unless the Commission is temporarily restrained and preliminarily and permanently enjoined from enforcing the erroneous and unlawful portions of the Resale Orders, BellSouth will suffer immediate, substantial, and irreparable harm, including:

- A. Loss of market share and goodwill as a result of confusion in the marketplace and market dislocation;
- B. Disruption of its uniform marketing plan and lost marketing opportunities in a highly competitive environment;
- C. Substantial administrative, legal and restructuring costs that must be incurred to comply with the Resale Orders; and
- D. Disruption of a carefully regulated and competitive marketplace, as a result of being forced to pay unwarranted subsidies to its competitors and waste valuable management time and resources.

37. BellSouth has no adequate remedy at law and seeks temporary, preliminary and permanent injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure.

38. For these reasons, BellSouth is entitled to an order enjoining enforcement of those portions of the Resale Orders that are challenged in this action.

#### **PRAYER FOR RELIEF**

WHEREFORE, plaintiff BellSouth Telecommunications, Inc. respectfully prays for judgment as follows:

1. That the Court enter a declaratory judgment pursuant to 28 U.S.C. § 2201, that the portions of the December 22, 2004 and June 3, 2005 Orders of the North Carolina Utilities Commission concerning an BellSouth's resale

obligations regarding one-time marketing incentives violate the  
Telecommunications Act of 1996 and are unlawful;

2. That the Court enter an order enjoining, on a temporary, preliminary, and permanent basis, the North Carolina Utilities Commission and all of its individual Commissioners from seeking to enforce the unlawful portions of the Commission's December 22, 2004 and June 3, 2005 Orders; and
3. That the Court grant BellSouth such additional relief as the Court may deem just and proper.

Respectfully submitted, this 2<sup>nd</sup> day of August, 2005.

BELLSOUTH TELECOMMUNICATIONS, INC.

By:



Frank A. Hirsch, Jr.  
N.C. State Bar No. 13904  
Matthew P. McGuire  
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### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the foregoing **Complaint for Declaratory and Injunctive Relief** was served on the persons indicated below by hand delivery and by placing a copy of thereof in the United States Mail, postage prepaid, certified mail, return receipt requested, and addressed as follows:

North Carolina Utilities Commission  
c/o Geneva Thigpen, Chief Clerk  
Dobbs Building  
430 North Salisbury Street  
Raleigh, NC 27603-5918

Jo Anne Sanford, Chair  
North Carolina Utilities Commission  
Dobbs Building  
430 North Salisbury Street  
Raleigh, NC 27603-5918

Dr. Robert K. Koger, Commissioner  
North Carolina Utilities Commission  
Dobbs Building  
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Robert V. Owens, Jr., Commissioner  
North Carolina Utilities Commission  
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Sam J. Ervin, IV, Commissioner  
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Lorinzo L. Joyner, Commissioner  
North Carolina Utilities Commission  
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James Y. Kerr, II, Commissioner  
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Howard N. Lee, Commissioner  
North Carolina Utilities Commission  
Dobbs Building  
430 North Salisbury Street  
Raleigh, NC 27603-5918

This the 2<sup>nd</sup> day of August, 2005

A handwritten signature in black ink, appearing to read "James Y. Kerr, II", written in a cursive style.

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION

**OFFICIAL COPY**

Civil Action No.

P 100 sub 72 B

BELLSOUTH TELECOMMUNICATIONS, )  
INC., )

Plaintiff, )

v. )

NORTH CAROLINA UTILITIES )  
COMMISSION; JO ANNE SANFORD, )  
Chairman; ROBERT K. KOGER, )  
Commissioner; ROBERT V. OWENS, JR., )  
Commissioner; SAM J. ERVIN, IV, )  
Commissioner; LORINZO L. JOYNER, )  
Commissioner; JAMES Y. KERR, II, )  
Commissioner; and HOWARD N. LEE, )  
Commissioner (in their official capacities as )  
Commissioners of the North Carolina )  
Utilities Commission), )

Defendants. )

**PLAINTIFF BELLSOUTH  
TELECOMMUNICATIONS, INC.'S  
MOTION FOR TEMPORARY  
RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION**

Plaintiff BellSouth Telecommunications, Inc. ("BellSouth"), by and through its undersigned counsel and pursuant to Rule 65 of the Federal Rules of Civil Procedures, respectfully moves for the entry of a temporary restraining order and preliminary injunction enjoining the enforcement of certain portions of the North Carolina Utilities Commission's (the "Commission") December 22, 2004 Order Ruling on Motion Regarding Promotions and its June 3, 2005 Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay (collectively, the "Resale Orders"), in the action entitled *In the Matter of Implementation of Session Law 2003-91, Senate Bill 814 Titled "An Act to Clarify the*

*Law Regarding Competitive and Deregulated Offerings of Telecommunications Services,”*

Docket No. P-100, Sub 72b. In support of this Motion, BellSouth shows the Court as follows:

1. On June 25, 2004, the Public Staff of the North Carolina Utilities Commission (“Public Staff”) filed a Motion for Order Concerning Eligibility for One-Day Notice and ILECs’ Obligations to Offer Promotions to Resellers. Among the issues for which the Public Staff sought guidance was the following: “If a [local exchange carrier] offers a benefit in the form of a check, a coupon for a check, or anything else of value for more than ninety days to incent subscription or continued subscription to a regulated service, is it required that the benefit be offered to resellers in addition to the reseller discount?”

2. On July 7, 2004, the Commission issued an order seeking comments on the Public Staff’s Motion. On August 6, 2004, the Public Staff filed comments advocating, in pertinent part, that incumbent local exchange carriers (“ILECs”) such as BellSouth be required to offer non-regulated marketing incentives such as gift cards to resellers in addition to the wholesale discount on regulated telecommunications services mandated by the Telecommunications Act of 1996 (the “Act”), 47 U.S.C. §251(c)(4)(A). Also on August 6, 2004, BellSouth, ALLTEL Carolina, Inc., Carolina Telephone and Telegraph Company and Central Telephone Company (collectively, “Sprint”), and Verizon South, Inc. (“Verizon”) filed comments with the Commission advocating, in pertinent part, that ILECs are only required to sell to competing local providers (“CLPs”) at wholesale rates any “telecommunications service” that the ILEC offers to retail customers. Furthermore, marketing incentives are not telecommunications services and do not reduce the retail rates customers pay for telecommunications services, and thus as a matter of law are not subject to the resale requirements of the Act.

3. On August 31, 2004, the Public Staff filed its Reply Comments, which argued that even if marketing incentives are not telecommunications services and are not subject to resale, they “effectively” constitute a discount on such services, and “[i]t is irrelevant whether the cost of the telecommunications service is directly affected or the customer reduces his expenses elsewhere.”

4. On August 31, 2004, BellSouth, Sprint and Verizon filed their respective reply comments, which emphasized that the Public Staff’s position regarding ILECs’ resale obligations with regard to marketing incentives was wholly unsupported by law, basic principles of statutory interpretation, and common sense.

5. On December 22, 2004, the Commission, acting through the individual Commissioners, issued its Order Ruling on Motion Regarding Promotions (the “First Resale Order”). The Commission ruled, in pertinent part, that marketing incentives such as gift cards that are in effect for more than 90 days “are in fact promotional offers subject to the FCC’s rules on promotions.” The Commission opined that a marketing incentive “reduces the subscriber’s cost for the service by the value received in the form of a gift card or other giveaway.” The Commission further held that “in order for a gift card type promotion not to require an adjustment to the resale wholesale rate (caused by the fact that the retail price has in effect been lowered), such a promotion must be limited to 90 days, unless the ILEC proves to the Commission that not applying the resellers’ wholesale discount to the promotional offering is a reasonable and nondiscriminatory restriction on the ILEC’s resale obligation.”

6. On February 18, 2005, BellSouth filed a Motion for Reconsideration or, in the Alternative, For Clarification, and for a Stay of the Commission’s First Resale Order. In this Motion, BellSouth argued that the Commission’s First Resale Order created a novel resale

obligation that is contrary to the resale requirements of the Act and which would require BellSouth to incur significant expenses creating North Carolina-specific exceptions in its marketing operations. BellSouth noted that pursuant to the Act and the FCC's rules, the Commission already had deducted the costs attributable to marketing expenses in calculating the wholesale discount CLPs receive when they purchase BellSouth's retail telecommunications services for resale. Thus, BellSouth argued, requiring it to resell marketing incentives (or the value thereof) at a wholesale discount would force BellSouth to subsidize the CLPs' marketing efforts and allows the CLPs to avoid the very costs that the resale provisions of the Act require each carrier to bear.

7. On June 3, 2005, the Commission, acting through the individual Commissioners, issued its Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay (the "Second Resale Order"). Although the Commission acknowledged that section 252(d)(3) of the Act provides that the wholesale rates to be charged to resellers shall be determined on the basis of retail rates charged to subscribers, it nonetheless effectively rewrote section 252(d)(3) of the Act by holding that marketing incentives have the effect of lowering "the actual, 'real' retail rate." The Commission ordered that BellSouth determine "the price lowering impact of any such 90-day-plus promotions on the real tariff or retail list price" and pass the benefit of such a reduction on to resellers through a wholesale discount on the "lower actual retail price." The Commission provided no guidance on how this hypothetical "real retail price" should be calculated; instead, it "intentionally left this matter open so that the parties would be free to negotiate." If a negotiated solution is not possible, BellSouth and the CLPs may bring the matter before the Commission. However, if it

is too difficult to calculate the "real retail price," the Commission will presume that a marketing incentive "would be unreasonable and discriminatory."

8. The aforementioned portions of the Resale Orders violate federal law by contravening the plain language of the Telecommunications Act of 1996, 47 U.S.C. §§ 251(c)(4)(A) and 252(d)(3). The Act does not authorize state Commissions to impose novel methods for calculating the wholesale rates for resellers of telecommunications services. To the contrary, the Act expressly provides that "a State commission *shall* determine wholesale rates *on the basis of retail rates charged to subscribers* for the telecommunications service requested, *excluding the portion thereof attributable to marketing . . .* and other costs that will be avoided by the local exchange carrier." 47 U.S.C. § 252(d)(3)(emphasis added).

9. Absent the entry of a temporary restraining order and preliminary injunction, the Commission's Resale Orders will become effective and binding on BellSouth on August 2, 2005. Unless the Commission is temporarily restrained and preliminarily and permanently enjoined from enforcing the erroneous and unlawful portions of the Resale Orders, BellSouth will suffer immediate, substantial, and irreparable harm, including:

- A. Loss of market share and goodwill as a result of confusion in the marketplace and market dislocation;
- B. Disruption of its uniform marketing plan and lost marketing opportunities in a highly competitive environment;
- C. Substantial administrative, legal and restructuring costs that must be incurred to comply with the Resale Orders; and

- D. Disruption of a carefully regulated and competitive marketplace, as a result of being forced to pay unwarranted subsidies to its competitors and waste valuable management time and resources.

10. Defendants, on the other hand, will not be injured by the entry of a temporary restraining order and preliminary injunction. BellSouth has provided 90-day-plus marketing incentives to North Carolina consumers for several years without challenges from any party. The Commission only recently took issue with this long-standing practice, and no other state commission in BellSouth's operating territory has held similarly. Just as it suffered no injury during the previous years in which BellSouth and other ILECs offered these long-term marketing incentives, the Commission cannot claim that it will suffer any injury from maintaining the status quo during the pendency of this action.

11. In further support of this Motion, BellSouth refers to, and incorporates herein by reference, its Complaint and Memorandum of Law in Support of Motion for Temporary Restraining Order and Preliminary Injunction.

12. Undersigned counsel certifies to the Court that notice of this motion has been attempted by delivering copies of the Complaint, Motion for Temporary Restraining Order and Preliminary Injunction, and Memorandum of Law in Support thereof to the following persons:

North Carolina Utilities Commission  
c/o Geneva Thigpen, Chief Clerk  
Dobbs Building  
430 North Salisbury Street  
Raleigh, NC 27603-5918

and



Robert H. Bennick, Jr.  
Director and General Counsel  
North Carolina Utilities Commission  
Dobbs Building  
430 North Salisbury Street  
Raleigh, NC 27603-5918

WHEREFORE, Plaintiff BellSouth Telecommunications, Inc. respectfully requests that the Court enter a temporary restraining order, pursuant to Rule 65 of the Federal Rules of Civil Procedure:

1. Enjoining Defendants from enforcing (a) Conclusion No. 5 of the Commission's December 22, 2004 Order Ruling on Motion Regarding Promotions, and (b) the Commission's Conclusions regarding Resale Obligations and One-Time Gift Promotions in its June 3, 2005 Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay (pp. 5-7, therein);
2. Ordering Defendants to appear within ten days hereof and show cause why a preliminary injunction should not be entered continuing the injunctive relief requested herein pending the trial of this matter; and
3. Granting such other relief as the Court deems just and proper.

Respectfully submitted, this 2<sup>nd</sup> day of August, 2005.

BELLSOUTH TELECOMMUNICATIONS, INC.

By:



Frank A. Hirsch, Jr.  
N.C. State Bar No. 13904  
Matthew P. McGuire  
N.C. State Bar No. 20048  
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Email: frank.hirsch@nelsonmullins.com  
matt.mcguire@nelsonmullins.com

### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the foregoing **BellSouth Telecommunications, Inc.'s Motion for Temporary Restraining Order** was served on the persons indicated below by hand delivery and by placing a copy of thereof in the United States Mail, postage prepaid, certified mail, return receipt requested, and addressed as follows:

North Carolina Utilities Commission  
c/o Geneva Thigpen, Chief Clerk  
Dobbs Building  
430 North Salisbury Street  
Raleigh, NC 27603-5918

Jo Anne Sanford, Chair  
North Carolina Utilities Commission  
Dobbs Building  
430 North Salisbury Street  
Raleigh, NC 27603-5918

Dr. Robert K. Koger, Commissioner  
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Howard N. Lee, Commissioner  
North Carolina Utilities Commission  
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430 North Salisbury Street  
Raleigh, NC 27603-5918

This the 2<sup>nd</sup> day of August, 2005

A handwritten signature in black ink, appearing to be "Watts" followed by a large, stylized flourish or loop.

## **EXHIBIT E**

**FILED**

AUG 03 2005

Clark's Office  
N.C. Utilities CommissionIN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION**FILED**  
CHARLOTTE, N. C.

AUG 2 2005

Civil Action No. 3:05-cr-345

U. S. DISTRICT COURT  
W. DIST. OF N. C.BELLSOUTH TELECOMMUNICATIONS, )  
INC., )

Plaintiff, )

v. )

NORTH CAROLINA UTILITIES )  
COMMISSION; JO ANNE SANFORD, )  
Chairman; ROBERT K. KOGER, )  
Commissioner; ROBERT V. OWENS, JR., )  
Commissioner; SAM J. ERVIN, IV, )  
Commissioner; LORINZO L. JOYNER, )  
Commissioner; JAMES Y. KERR, II, )  
Commissioner; and HOWARD N. LEE, )  
Commissioner (in their official capacities as )  
Commissioners of the North Carolina )  
Utilities Commission), )

Defendants. )

**TEMPORARY RESTRAINING ORDER**

This matter is before the Court upon the Motion of Plaintiff BellSouth Telecommunications, Inc. (hereinafter "BellSouth") for a Temporary Restraining Order pursuant to Rule 65(a) of the Federal Rules of Civil Procedure. It appearing to the Court that the Complaint, Motion, brief, and material supporting BellSouth's Motion have been duly filed and served upon the Defendants as well as on the General Counsel of the North Carolina Utilities Commission, providing notice of these proceedings and of the intent to seek a temporary restraining order, the Court has reviewed the Complaint, Motion, brief, supporting affidavits, as well as the exhibits attached thereto, and upon good cause shown, finds that unless this temporary restraining order is entered, BellSouth will suffer irreparable harm, including

incalculable costs, competitive disadvantages, damage to goodwill, and marketing potential, constituting irreparable harm, before the matter can be heard on BellSouth's motion for a preliminary injunction. This Temporary Restraining Order sought by BellSouth is otherwise necessary and proper to preserve the *status quo ante* while issues raised by the Complaint for decision by this Court are considered and decided. This Court finds further that this Temporary Restraining Order is proper in light of the balance between the harm that denying injunctive relief will inflict upon BellSouth and the harm that granting the injunction may inflict on any other party, the likelihood of BellSouth's success on the merits, and the public interest in avoiding consumer confusion and potential marketing dislocation.

With regard to the security bond required pursuant to Rule 65(c) of the Federal Rules of Civil Procedure, this Court exercises its discretionary power to waive the bond because the solvency of the movant is undisputed. Given the substantial assets and financial stability of BellSouth, this court finds that no parties are in danger of being unable to collect amounts that BellSouth would be required to pay if this temporary restraining order were denied; accordingly,

**IT IS HEREBY ORDERED** that Defendants the North Carolina Utilities Commission and, in their official capacities, the following Commissioners: Jo Anne Sanford; Robert K. Koger; Robert V. Owens, Jr.; Sam J. Ervin, IV; Lorinzo L. Joyner; James Y. Kerr, II; and Howard N. Lee, be, and hereby are temporarily enjoined and restrained from enforcing Conclusion No. 5 of the Commission's December 22, 2004 Order Ruling on Motion Regarding Promotions, *In the Matter of Implementation of Session Law 2003-91, Senate Bill 814 Titled "An Act to Clarify The Law Regarding Competitive and Deregulated Offerings of Telecommunications Services"*, Docket No. P-100, Sub-72b as well as the Commission's Conclusions regarding Resale Obligations and One-Time Gift Promotions in its June 3, 2005

Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay, *In the Matter of Implementation of Session Law 2003-91, Senate Bill 814 Titled "An Act to Clarify The Law Regarding Competitive and Deregulated Offerings of Telecommunications Services"*, Docket No. P-100, Sub-72b (pp. 5-7, therein).

This Temporary Restraining Order shall remain in full force and effect until the 12th day of August, 2005, at 11:00 a.m./p.m. unless extended for a longer time by consent or for good cause shown.

**IT IS FURTHER ORDERED** that no bond by BellSouth is required as security for this temporary restraining order.

**IT IS FURTHER ORDERED** that service of a copy of this Order, BellSouth's Complaint, brief, supporting affidavits, and exhibits shall be served upon Defendants.

**IT IS FURTHER ORDERED** that the hearing on BellSouth's motion for Preliminary Injunction is set for the 11th day of August, 2005, at 2:00 a.m./p.m. to be held in Courtroom 3 at the Federal Courthouse, Charlotte, North Carolina, at which time Defendants shall appear and show cause, if any there be, why the preliminary injunctive relief requested by BellSouth should not be granted.

**IT IS SO ORDERED.**

  
United States District Court Judge, Presiding

Date: 2 AUG 05  
3:28 PM



## **EXHIBIT F**